A **KERAJAAN NEGERI KELANTAN DARUL NAIM**

v.

SYARIKAT KEMAJUAN TIMBERMINE SDN BHD & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
ANANTHAM KASINATHER JCA
C [CIVIL APPEALS NO: D-01-34-2010 & D-01-96-2010]
16 NOVEMBER 2012

CIVIL PROCEDURE: *Limitation of action - Contract - Application to strike out suit on basis of limitation dismissed by Registrar without*
D *written grounds - Whether applicant free to raise limitation as defence to civil action - Whether res judicata applicable*

CONTRACT: *Formation - Terms - No agreement as to terms - No feedback on proposals - Whether a binding legal contract existed*

E ***CONTRACT:*** *Termination - Validity of - Termination for breach of terms of contract - Conduct of party in breach subsequent to termination - Whether implicit acknowledgement that termination valid*

Pursuant to an agreement dated 20 July 1964 ('the principal
F agreement'), the appellant *inter alia*, granted Timbermine Industrial Corporation Limited ('the company') the right to log and extract timber in a specified area. The specified area was reduced in size following a supplementary agreement dated 6 November 1965. On 7 February 1970, the rights of the company under the agreements
G were assigned to the respondent. The appellant later acknowledged the assignment. The appellant terminated the agreements through its letter dated 18 March 1975, citing the respondent's failure to fulfill certain requirements, in breach of cl. 5(b) of the principal agreement. Notwithstanding the termination, on 17 June 1975, the
H appellant met the respondent and agreed to explore the possibility of forming a joint venture company with the respondent to carry out the work originally undertaken by the respondent under the agreements. Subsequently, by letter dated 16 October 1975, the respondent forwarded certain proposals to the appellant on the
I proposed joint-venture, *albeit* on without prejudice basis, and, having received no reply thereto, sought for payment of RM3.5 million as goodwill to settle the dispute. The appellant's response

was to effect payment of the RM3.5 million, subject to qualifications. No payment was however forthcoming, and in 2004, the respondent sued the appellant in the High Court claiming that the termination of the agreements were unlawful, and secondly for damages arising from the appellant's failure to set up a joint-venture company with the respondent. The facts showed that prior to the hearing of the present action, the appellant applied unsuccessfully to strike out the respondent's claim based on limitation, but filed no appeal against the decision of the Senior Assistant Registrar ('SAR') thereon. Be that as it may, in the present case, before the High Court judge, the appellant again raised the defence of limitation. The High Court found for the respondent and awarded the respondent RM560,000 and RM13.6 million respectively as general and special damages. The appellant appealed and the respondent cross-appealed against the award of damages.

Held (allowing the appeal and dismissing the cross-appeal): Per Anantham Kasinather JCA delivering the judgment of the court:

(1) The trial judge erred when he held the termination unlawful for the following reasons, *ie,* (i) the trial judge assumed that the termination was pursuant to cl. 11(A) when the termination was clearly pursuant to cl. 5(b)(i) and the respondent did not seriously dispute being in breach of the clause. On the facts, the respondent was indeed in breach of cl. 5(b); (ii) the respondent's conduct subsequent to the termination could only be described as an implicit acknowledgement that the termination was valid; (iii) the trial judge held that cl. 11(A) was applicable to the breach when in fact cl. 5(b) was applicable and entitled the appellant to terminate; and (iv) the trial judge held that cl. 6 of the supplementary agreement was applicable. (para 11)

(2) The respondent had failed to discharge the burden of proving that the notice under cl. 5(b) of the principal agreement was without foundation. By having failed to discharge this burden, the respondent's claim ought to have been dismissed. The trial judge had erred in slavishly following the authorities of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* and *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim &*

Anor without sufficient regard to the particular facts of the cases. Those cases were accident cases where since there are usually two versions to every accident, if the defendant does not call evidence at the end of the plaintiff's case, it is logical for the court to rule in favour of the plaintiff since there is only one version as a result of the defendant having failed to challenge the plaintiff's version. (*Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor;* dist) and *(Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor;* dist). (paras 12-14)

(3) A careful examination of the documentary evidence revealed that the appellant merely agreed to explore the possibility of setting up the joint venture and never at any time assured the respondent of the formation of the joint venture. The terms upon which the joint venture was to be set up were never agreed upon so as to result in the coming into effect of a legally enforceable contract. Further, the appellant never reverted to the respondent on its proposals and less still agreed to the proposals contained in the respondent's letter of 16 October 1975 so as to bring about a binding legal contract. (paras 16-20)

(4) The appellant's plea of limitation in the defence was sufficiently comprehensive to allow the appellant to rely on the defence irrespective of whether the claim was based on the agreement or the settlement agreements. For the defence of *res judicata* to apply in the instant case, the court had to examine the judgment of the SAR. In the instant case, the SAR did not provide grounds of judgment and the respondent was not contending that the SAR had ruled that the defence of limitation was not available to the appellant at the trial. It was conceivable that the SAR was of the opinion that there had to be a trial of the action before the court could determine whether the respondent's claim was defeated by limitation. The appellant did not at any time either by way of representation or conduct unequivocally cause the respondent to believe that the appellant would not rely on the defence of limitation so long as settlement negotiations were ongoing. (para 23)

(5) Since the termination was not unlawful and no settlement agreement had come into force, it was not necessary for the Court of Appeal to deal with the issue of damages. Be that as it may, the High Court had not complied with the principles of law governing the quality of evidence that has to be produced by a claimant *ie*, the respondent in the instant case, to succeed in obtaining substantial damages in a claim based on breach of contract. The principles of law governing the quality of evidence that must be produced is as set out in *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd.* (paras 25-27)

Bahasa Malaysia *Translation Of Headnotes*

Berikutan satu perjanjian bertarikh 20 Julai 1964 ('perjanjian utama'), perayu, antara lain, telah memberi hak kepada Timbermine Industrial Corporation Limited ('syarikat itu') untuk membalak dan mengekstrak kayu balak di suatu kawasan tertentu. Kawasan tertentu itu telah dikurangkan dari segi saiz berikutan satu perjanjian tambahan bertarikh 6 November 1965. Pada 7 Februari 1970, hak syarikat itu di bawah perjanjian-perjanjian telah diserahhakkan kepada responden. Perayu kemudiannya mengakui penyerahan itu. Perayu telah menamatkan perjanjian-perjanjian itu melalui suratnya bertarikh 18 Mac 1975, atas alasan kegagalan responden untuk memenuhi beberapa keperluan, dalam kemungkiran fasal 5(b) perjanjian utama. Tanpa mengambilkira penamatan itu, pada 17 Jun 1975, perayu telah berjumpa dengan responden dan bersetuju untuk menerokai kemungkinan menubuhkan satu syarikat perniagaan usahasama dengan responden di bawah perjanjian-perjanjian. Selepas itu, melalui surat bertarikh 16 Oktober 1975, responden telah memajukan beberapa cadangan kepada perayu berkenaan cadangan perniagaan usahasama, walaupun atas dasar tanpa prasangka, dan, dengan tidak menerima sebarang balasan, telah meminta bayaran RM3.5 juta sebagai jasa baik untuk menyelesaikan pertikaian. Balasan responden adalah untuk membuat bayaran RM3.5 juta, tertakluk kepada syarat-syarat. Walau bagaimanapun, tiada bayaran dibuat dan pada tahun 2004, responden telah mendakwa perayu di Mahkamah Tinggi dengan menuntut bahawa penamatan perjanjian-perjanjian adalah tidak sah, dan kedua bagi ganti rugi yang berbangkit daripada kegagalan perayu untuk menubuhkan satu syarikat perniagaan usahasama dengan responden. Fakta menunjukkan bahawa sebelum pendengaran guaman ini, perayu gagal dalam permohonannya

untuk membatalkan tuntutan responden berdasarkan had masa tetapi tidak memfailkan sebarang rayuan terhadap keputusan Penolong Kanan Pendaftar ('PKP'). Walau apa pun, dalam kes di sini, di hadapan hakim Mahkamah Tinggi, perayu telah membangkitkan pembelaan had masa. Mahkamah Tinggi telah memutuskan bagi pihak responden dan mengawadkan responden RM560,000 dan RM13.6 juta masing-masing sebagai ganti rugi am dan khas. Perayu merayu dan responden merayu silang terhadap award ganti rugi itu.

Diputuskan (membenarkan rayuan, menolak rayuan silang) Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara khilaf apabila beliau memutuskan bahawa penamatan itu adalah tidak sah bagi sebab-sebab berikut, iaitu, (i) hakim bicara menyangka bahawa penamatan berikutan fasal 11(A) apabila penamatan jelas di bawah fasal 5(b)(i) dan responden tidak menyangkal kemungkiran klausa itu. Berdasarkan fakta, responden sememangnya memungkiri fasal 5(b); (ii) kelakuan responden selepas penamatan hanya boleh dikatakan sebagai pengiktirafan tersirat bahawa penamatan adalah sah; (iii) hakim bicara memutuskan bahawa fasal 11(A) terpakai terhadap kemungkiran apabila fasal 5(b) terpakai dan perayu layak untuk penamatan; dan (iv) hakim bicara memutuskan bahawa fasal 6 perjanjian tambahan adalah terpakai.

(2) Responden gagal untuk melepaskan beban untuk membuktikan bahawa notis di bawah fasal 5(b) perjanjian utama adalah tanpa asas. Atas kegagalan responden melepaskan beban ini, tuntutan responden sepatutnya ditolak. Hakim bicara khilaf dalam mengikut autoriti-autoriti seperti *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* dan *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* tanpa menghiraukan fakta kes-kes itu. Kes-kes tersebut adalah berkenaan kemalangan di mana memandangkan selalunya terdapat dua versi bagi setiap kemalangan, jika defendan tidak memanggil keterangan pada akhir kes plaintif, adalah logik bagi mahkamah memutuskan bagi pihak plaintif memandangkan hanya terdapat satu versi disebabkan defendan telah gagal mencabar versi plaintif.

(3) Penelitian teliti keterangan dokumentari menunjukkan bahawa perayu telah bersetuju untuk menerokai kemungkinan mendirikan perniagaan usahasama dan tidak pada bila-bila masa meyakinkan responden berkenaan penubuhan perniagaan usahasama. Terma di mana perniagaan usahasama akan dibentuk tidak pernah dipersetujui untuk mewujudkan satu kontrak yang boleh dikuatkuasakan. Tambahan, perayu tidak membalas kepada responden berkenaan cadangannya dan walaupun begitu masih bersetuju dengan cadangan yang terkandung di dalam surat responden bertarikh 16 Oktober 1975 untuk mewujudkan satu kontrak sah yang mengikat.

(4) Alasan perayu berkenaan had masa di dalam pembelaannya adalah komprehensif untuk membolehkan perayu bergantung terhadap pembelaan tanpa mengambilkira sama ada tuntutan bergantung kepada perjanjian atau perjanjian-perjanjian penyelesaian. Bagi pembelaan *res judicata* terpakai di dalam kes ini, mahkamah perlu mengkaji penghakiman PKP. Di dalam kes ini, PKP tidak membekalkan alasan penghakiman dan responden tidak berhujah bahawa PKP telah memutuskan bahawa pembelaan had masa tidak sedia ada bagi perayu semasa perbicaraan. Adalah nyata bahawa PKP berpendapat bahawa perlu adanya perbicaraan tindakan sebelum mahkamah memutuskan sama ada tuntutan responden ditewas oleh had masa. Perayu tidak pada bila-bila masa sama ada secara representasi atau pun kelakuan menyebabkan responden mempercayai bahawa perayu tidak akan bergantung atas pembelaan had masa asalkan rundingan penyelesaian masih berjalan.

(5) Memandangkan penamatan bukanlah tidak sah dan perjanjian penyelesaian masih belum dikuatkuasakan, ia tidak perlu bagi Mahkamah Rayuan mengendalikan isu berkenaan ganti rugi. Walaupun begitu, Mahkamah Tinggi tidak mematuhi prinsip undang-undang yang menguasai kualiti keterangan yang sepatutnya dikemukakan oleh seorang pemohon, iaitu responden di dalam kes ini, untuk berjaya memperolehi ganti rugi substansial dalam suatu tuntutan berdasarkan kemungkiran kontrak. Prinsip undang-undang yang mengawal kualiti undang-undang yang mesti dikemukakan adalah seperti dinyatakan di dalam *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd.*

Case(s) referred to:

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(dist)***

JH Milner & Sons v. Percy Bilton Ltd [1966] 2 All ER 894 ***(refd)***

Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369 CA ***(dist)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(foll)***

Storey v. Storey [1961] P 63 ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Wasakah Singh v. Bachan Singh [1931] 1 MC 125 ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 29

Rules of the High Court 1980, O. 18 r. 19

For the appellant - Hj Sulaiman (Raja Ahmad Mohzanuddin with him); M/s Fozi Zain

For the respondent - Mohd Shafee (Harvinderjit Singh & Richard Lee with him); M/s Shafee & Co

[Appeal from High Court, Kota Bharu; Civil Suit No: 21-5-2004]

Reported by Andrew Christopher Simon

JUDGMENT

Anantham Kasinather JCA:

Introduction

[1] Appeal No. D-01-34-2010 is an appeal by the appellant seeking to set aside the order of the High Court ordering it to pay substantial sum of monies by way of general and special damages to the respondent. The respondent by Civil Appeal No: D-01-96-2010, in turn, is seeking to enhance the amount payable to it pursuant to the same order of the High Court. With the agreement of both counsel, we heard both appeals simultaneously and with their agreement, there is to be one judgment in respect of both appeals.

Background Facts

[2] Pursuant to an agreement in writing dated 20 July 1964 ("principal agreement") made between Timbermine Industrial Corporation Limited ('the company') and the appellant, the

appellant granted to the company *inter alia* the right to log and extract timber in accordance with the annual-extraction-quota in an area extending to 510,239 acres (specified area). The following are *inter alia* the expressed terms of the principal agreement: A

(i) That the appellant shall give full authority to the company or its subsidiary company, their servants, agents, workmen, and assigns to enter the specified area for a period of 33 years from the date of the principal agreement; B

(ii) That the specified area forming part of the state land extended to 510,239 acres; C

(iii) That the company shall pay royalties to the appellant in the sum of RM2 million by way of two instalments of RM1 million each, the first instalment to be made upon the signing of the said principal agreement; D

(iv) That the respondent was to give priority to logging in approximately 133,360 acres of the specified area consisting of jungle land which was required for land development by the appellant (hereinafter referred to as 'the development areas'). The working schedule for the clearance of the development areas apart from being delineated in the principal agreement was to be fixed and agreed by the parties hereto from time to time provided that not less than 30,000 acres was to be cleared in the first six (6) years from the date of the principal agreement with the remaining to be completed in the next seven (7) years. The respondent was to log from the remaining specified area not less than 40,000 tons of timber per year after the first thirteen (13) years of the signing of the principal agreement (cl. 5(b)). E F G

(v) In the event the respondent fails to log 30,000 acres within the first six years or the remaining acreage of 'the development areas' in the next seven (7) years as stipulated in sub-cl. 5(b) above, then, the appellant shall be entitled to terminate this agreement. The company shall not have any claim or compensation for anything suffered or done by the company. H

(Clause 5 (b) (i))

(vi) In the event of either party hereto failing to comply with the terms and conditions herein and no specific provisions have herein above been stipulated for the breach or non-compliance of such terms and conditions, the other party shall be entitled I

A to terminate this agreement without prejudice to such party's right for damages for breach of contract but such right of termination shall not be exercised until the other party has served notice in writing on the defaulting party requesting such party to remedy the breach or non-compliance within six
B (6) months of the date of such notice and the defaulting party continues or persists in such breach of non-compliance provided always that if during the continuance of this agreement by cause of civil commotion, war, enforcement of Emergency regulation, floods or other acts of God it shall
C become impossible for either party hereto to perform their respective part of this agreement, neither party shall be entitled to terminate this agreement nor enforce any of its terms. On the determination of the cause aforesaid the performance of this agreement shall be resumed within
D reasonable time.

(Clause 11(A))

[3] Pursuant to the principal agreement, the company on 20 July
E 1964 paid to the appellant the sum of RM1 million being the first instalment. By way of a supplementary agreement dated 6 November 1965 (the 'Supplementary Agreement' the principal and supplementary agreements to be hereinafter referred to as 'the agreements'), the principal agreement was varied *inter alia* to
F reduce the specified area from 510,239 acres to 280,000 acres ('the reduced specified area'). The supplementary agreement *inter alia* included the following provision:

The State Government will agree to re-negotiate from time to time the provisions and stipulations contained in the whole of this
G sub-clause on the submission of feasibility reports by consultants (such consultants to be approved by the State Government) specialized in the extraction and processing of timber Provided Always that in the event of the Company setting up an integrated timber industry in the Specified Area, the State Government shall
H not exercise its right of termination under sub-clause (b)(i) hereinabove and shall grant the Company reasonable extension of time to log in those portions of the Development Areas which the State Government does not as yet require or is not ready to utilize or such portions as are subsequently found unsuitable for agricultural development so as not to disrupt the continuous flow
I of supply of timber to the factories and mills set up by the company in the Specified Area.

(Clause 6)

On or about 7 February 1970, the rights of the company under the agreements were assigned to the respondent. The appellant acknowledged the assignment *vide* letter dated 12 September 1970 and agreed to treat the first instalment of RM1 million paid by the company as payment made by the respondent.

[4] The appellant terminated the agreements *vide* letter dated 18 March 1975. The letter cited the respondent's failure to fulfil the minimum logging requirements in breach of cl. 5(b) as the reason for termination. The respondent by its letter of 21 April 1975 disputed the validity of the notice of termination. The respondent thereafter sought the assistance of several Federal Ministers originating from Kelantan to help solve its unhappiness over the termination of the agreements. The first of a series of meetings was convened on the initiative of the respondent on 17 June 1975 and attended by Yang Mulia Tengku Ahmad Rithauddeen, the representatives of the appellant, the Treasury and representatives of the respondent. During this without prejudice meeting, it was agreed that the parties would explore the possibility of setting up a joint-venture company to undertake the work originally to be undertaken by the respondent under the agreements. The joint-venture to be owned 70/30 by the appellant and respondent respectively. From the minutes of this meeting, it would appear that the respondent was not anxious to commence any form of legal proceedings against the appellant but anxious to participate in a joint-venture with the appellant even if this resulted in the concession being a smaller area. The meeting concluded with the appellant requiring the respondent to apply formally for this new concession and to put forward its proposals concerning the joint-venture.

[5] Following the meeting, the respondent in a without prejudice letter dated 16 October 1975 put forward its proposals as to the form that the proposed joint-venture should take and as to how the existing assets of the respondent should be dealt with upon the formation of the joint-venture. As there was no positive response from the appellant to the respondent's letter of 16 October 1975, the respondent now pursued its proposals through the then Finance Minister of Malaysia Yang Berhormat Tengku Razaleigh Hamzah. By its letter of 22 September 1976 addressed to Yang Berhormat Tengku Razaleigh Hamzah, the respondent now sought payment of the sum of RM3.5 million as goodwill; the formation of the joint-venture; for the joint-venture company to take over the assets belonging to the respondent and

for the respondent to be awarded a concession pending the formation of the joint-venture company. The proposals contained in the respondent's letter of 22 September 1976 were promptly communicated to the appellant by Yang Berhormat Tengku Razaleigh Hamzah *vide* his letter of 28 September 1976. Yang Berhormat Tengku Razaleigh Hamzah expressly stated that his letter was 'without prejudice' to whatever action had been taken by the appellant following the termination of the agreements.

[6] The appellant's response to Yang Berhormat Tengku Razaleigh Hamzah's letter of 22 September 1976 was to effect payment of RM3.5 million to the respondent subject to the following qualification:

> Suka juga dipertegaskan di sini bahawa persetujuan yang dibuat ini tidak memperasangkakan akan tindakan yang telah diambil oleh Kerajaan Negeri dan seterusnya juga bagi sebarang perkiraan yang akan dilakukan kemudian kelak terhadap usaha-usaha yang dirancangkan bagi pembangunan di kawasan ini (Paragraph 4 of letter at page 314 of Jilid 3 Bahagian C).

Respondent's Cause Of Action

[7] The respondent's cause of action can be said to be twofold. The first claim is that the termination of the agreements is unlawful. The basis for this contention is that the termination ought to have been preceded by a notice providing the respondent with the opportunity to explain the reasons behind its default in complying with the logging requirements set out in cl. 5(b) of the principal agreement. Additionally, the respondent alleged that under cl. 6 of the supplementary agreement, it was entitled to an extension of time if during this time, it had already completed a timber complex and this it had accomplished. The second claim was that following the termination, the parties had entered into a settlement agreement and under this agreement the appellant had undertaken to set up a joint-venture company and it had in breach of the terms of the settlement agreement failed to do so. Accordingly, the alternative cause of action was for damages suffered by the respondent arising from the appellant's failure to set up the joint-venture company pursuant to the terms of the settlement agreement.

The Appellant's Defence

[8] The primary defence of the appellant was limitation. The appellant contended that the respondent's cause of action accrued due on the date of termination ie, 18 March 1975 and six years had long passed when the respondent filed this suit in 2004. According to the appellant, the respondent's alternative cause of action based on the settlement agreement also expired some considerable time before the filing of the claim based on the respondent's own pleaded case that the settlement agreement came into effect on 17 June 1975.

Judgment Of The High Court

[9] The learned trial judge declared the termination to be unlawful on the grounds that the appellant had failed to give notice providing the respondent with the opportunity to rectify any default as required by cl. 11(A) of the principal agreement. The learned trial judge did not provide any basis for determining the validity of the termination notice based on cl. 11(A) when it was the appellant's pleaded case that the notice was provided pursuant to cl. 5(b) of the principal agreement. Since His Lordship proceeded on the premise that the notice was issued pursuant to cl. 11(A), His Lordship did not consider the validity of the notice of termination based on cl. 5(b) of the principal agreement. As regards the second issue, His Lordship declared the settlement agreement to be null and void notwithstanding making a ruling of law that the settlement agreement had come into existence based on the conduct of both parties. The judgment of the learned trial judge does not include an examination of the correspondence exchanged between the parties including the solicitors for the respondent as regards the structure of this joint-venture company. Although the prayer for general and special damages was premised on the settlement agreement being legally binding, His Lordship contrary to his ruling of law that the settlement agreement had come into existence declared the settlement agreement to be null and void. Thereafter His Lordship ordered general damages of RM560,000 based on the respondent's 30% share of 280,000 acres at RM2,000 per acre and, additionally, ordered special damages of RM13.6 million purportedly representing the value of

A the respondent's machinery and equipment and costs of infrastructure effected by the respondent at the time of the termination of the agreements.

Judgment Of The Court

B **[10]** In our judgment, the following issues are relevant in determining the outcome of this appeal. First, whether the agreements were validly terminated ('first issue'). Secondly, the effect in law of the appellant electing not to call any evidence at the end of the respondent's case ('second issue'). Thirdly, whether C a settlement agreement came into the existence on 17 June 1975 based on the minutes of the meeting of 17 June 1975 to be found at pp. 288 to 290 of Jilid 3 Bahagian C ('third issue'). Fourthly, whether the respondent's claims based on the agreements and the settlement agreement are barred by limitation ('fourth issue'). D Fifthly, whether the respondent is entitled to general damages based on the formula adopted by the learned trial judge ('fifth issue').

First Issue

E **[11]** In our judgment, the learned trial judge erred when he held the termination to be unlawful for the following reasons:

(i) First, His Lordship assumed that the termination was pursuant F to cl. 11(A) when the termination was clearly pursuant to cl. 5(b)(i). A careful examination of cl. 5(b) will reveal that unlike cl. 11(A), cl. 5(b) does not require the notice of termination to be preceded by a notice providing the respondent with the opportunity to be heard or be provided G with the opportunity to rectify any default. In our judgment, if His Lordship had examined the validity of the termination based on the breach of cl. 5(b), then, His Lordship would have realised that the respondent did not seriously dispute being in breach of the same. We opine to this effect because H the respondent's denial of the breach in its reply of 21 April 1975 is fairly muted as evidenced by the words preceding the denial 'in the light of the events ...'. Furthermore, 'the events' referred to in the respondent's letter of 21 April 1975 can reasonably be inferred to be the events set out in the I respondent's letter of 13 February 1968. In this letter, the respondent implicitly admitted that it would not be able to comply with the requirements of cl. 5(b) and sought an

extension of two years to comply with the same. In other words, in anticipation of not being able to comply with the requirement to log, clear and surrender to the appellant, not less than 30,000 acres in the first six years ie, expiring 20 July 1970, the respondent was seeking the consent of the appellant to extend the time for such compliance. In our judgment, the contents of this letter substantiates the claim of the appellant that the respondent was indeed in breach of cl. 5(b);

(ii) Secondly, in our judgment, the respondent's conduct subsequent to the termination can only be described as amounting to an implicit acknowledgment that the termination was valid. We opine to this effect because following the notice of termination, the respondent never claimed to have complied with cl. 5(b). The only response was the bare denial contained in its solicitor's letter of 21 April 1975. Thereafter, the respondent only pursued matters relating to the recovery of the goodwill money, the formation of the joint-venture company and was even prepared to accept a logging concession of 20,000 acres *in lieu* of participation in the joint-venture company. Indeed, the evidence reveals that the respondent not only did not seriously challenge the validity of the termination but acknowledged the validity of the termination by its then solicitor's letter of 24 January 1995. By this letter, the respondent expressed regret that whilst the appellant had deemed it fit to provide other entities with smaller alternative logging concessions following the termination of their agreements, the appellant had not extended the same generosity to the respondent;

(iii) Thirdly, His Lordship, in our judgment, erroneously accepted the submission of learned counsel for the respondent that: first, that the termination was pursuant to cl. 11(A) of the agreement, contrary to the appellant's pleaded case, secondly, that cl. 11(A) was applicable to the breach, when cl. 5(b) was applicable since breach of cl. 5(b) included a specific provision entitling the appellant to terminate for this breach thereby rendering cl. 11(A) to be inapplicable, contrary to the finding of the learned trial judge, and, finally, in holding cl. 6 of the supplementary agreement to be applicable to the facts of this case when the words in cl. 6 relate to the setting up of an "integrated timber industry" and not an "integrated timber

A complex". With respect, we accept the submission of learned counsel for the appellant that the word 'complex' in its ordinary meaning refers to a group of similar buildings or facilities on the same site whilst the word 'industries' refers to economic activity involving the processing of raw materials and
B the manufacture of timber products in such factories.

Accordingly, for the reasons stated above, in our judgment, the learned trial judge erred in finding the appellant's termination of the agreements to be unlawful.

C

Second Issue

[12] On the second issue, the learned trial judge based on the authorities of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 and *Mohd Nor Afandi Mohamed Junus v.*
D *Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369 held that a court of law must accept as true the evidence of one party to the litigation, if the other party chose not to give evidence. In our judgment, these authorities do not absolve a court of law from evaluating the evidence adduced by the parties whether in the
E form of documentary evidence ie, documents in an agreed bundle, undisputed documents and oral evidence derived during cross-examination. This fact was acknowledged by Gopal Sri Ram JCA (as His Lordship then was) in *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor (supra)*. For instance on the facts of this
F case, His Lordship should have realised from the outset that the burden of proving that the notice of termination was unlawful was initially with the respondent as the claimant in the original suit. The fact that the appellant led no evidence did not absolve the respondent from discharging this burden in law.

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[13] On the facts of this case, the respondent sought to discharge this burden by relying on cl. 11(A) of the principal agreement and cl. 6 of the supplementary agreement when to all intents and purposes, the burden could only be discharged by
H proving that the notice under cl. 5(b) of the principal agreement was without foundation. The respondent having failed to discharge this burden, the respondent's claim ought to have been dismissed. With respect, the proposition of law in the two cases of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor (supra)* and
I *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor (supra)* have to be understood in the context of both cases

being accident cases in which the burden of proof is initially on the claimant alleging negligence against the defendant. Since it is invariably the case that there are two versions to every accident, it follows that if the defendant does not call any evidence at the end of the plaintiff's case, it is logical for the court to then rule in favour of the plaintiff since there is only one version as a result of the defendant having failed to challenge the plaintiff's version. Suriyadi JCA (as His Lordship then was) acknowledged this to be the case as evidenced by His Lordship's adoption of the pronouncement in the judgment of the court in the case of *Storey v. Storey* [1961] P 63 in *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor (supra)* to the following effect:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

[14] The reliance by learned counsel for the respondent on the pronouncements of Gopal Sri Ram FCJ (as His Lordship then was) in the case of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 in contending otherwise, are with respect, misplaced. In our judgment, the pronouncements of His Lordship in that case were based on the premise that the unopposed evidence of the claimant was credible and sufficient to discharge the initial burden vested on the claimant. This is evident from the approval by His Lordship of the passage in the judgment of the court in *Wasakah Singh v. Bachan Singh* [1931] 1 MC 125 to the following effect:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.

On the facts of this case, the learned trial judge made no finding of fact of the respondent having proved that the notice of termination was in breach of cl. 5(b) of the principal agreement

pursuant to which the notice had been issued. For this reason, the claimant cannot claim to have discharged the initial burden vested upon it. As regards the settlement agreement, the evidence led by the respondent clearly did not establish the existence of a legally enforceable contract for the reasons which appear later in this judgment. Accordingly, in our judgment, the learned trial judge erred in slavishly following the authorities of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor (supra)* and *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor (supra)* without sufficient regard to the particular facts of this case.

Third Issue

[15] On the third issue, the respondent's case is that following the termination of the agreements, the parties concluded a settlement agreement in the presence of Yang Mulia Tengku Ahmad Rithauddeen on 17 June 1975. According to the respondent, the basic framework of this agreement was for the formation of a joint-venture company with the shareholding to be split 70/30 with the respondent holding 30% of the shares of the joint-venture company. The respondent's pleaded case is that the settlement agreement was subsequently varied by the parties sometime in November 1976 to include the following additional terms:

(a) the appellant to pay the sum of RM3.5 million as a gesture of goodwill to the respondents and

(b) the respondent was not to commence legal action against the appellant to enforce its rights to the specified area

[16] With respect, we are unable to fathom the basis upon which His Lordship arrived at the conclusion that a legally enforceable contract had come into existence. In our judgment, a careful examination of the documentary evidence will reveal that the appellant merely agreed to explore the possibility of setting up the joint-venture and never at any time assured the respondent of the formation of the joint-venture. More importantly, the terms upon which the joint-venture was to be set up were never agreed upon so as to result in the coming into effect of a legally enforceable contract. For instance, the meeting of 17 June 1975 was held on a without prejudice basis and the minutes do not contain any

assurance on the part of the appellant's authorised representative that a joint-venture would be set up. This is evident from what is recorded in the minutes at the conclusion of the meeting:

> The meeting agreed that the Syarikat Timbermine forward 10 copies of their detailed proposals on the form of joint-venture to the Secretary in the Implementation, Co-ordination and Administration Development Section on 17 July 1974, and the meeting to discuss this proposal would be held on 25 July at 3.00pm in the Prime Minister's Operation Room.
>
> (Page 290 of Jilid 3 Bahagian C)

[17] In other words, the appellant merely agreed to meet again to further discuss the setting up of the joint-venture after receiving the respondent's proposals on the same. By a without prejudice letter dated 16 October 1975, the respondent forwarded its proposals for the setting up of the joint-venture company and the make-up of the same. This letter does not appear to have been acknowledged by the appellant. The next letter from the respondent is the letter of their solicitors dated 22 September 1976. This letter also does not appear to have been acknowledged by the appellant. One reason for the absence of any acknowledgement is probably because the letters were addressed to Yang Berhormat Tengku Razaleigh Hamzah and not to the appellant. The next letter is dated 28 September 1976 from Yang Berhormat Tengku Razaleigh Hamzah to the appellant. This letter is acknowledged by the appellant *vide* its letter of 28 November 1976. The contents of these two letters are significant as the contents are being relied upon by the respondent as amounting to a variation of the settlement agreement purportedly concluded on 17 June 1975.

[18] At the outset, we wish to highlight the fact that Yang Berhormat Tengku Razaleigh Hamzah expressly acknowledged that his letter of 28 September 1976 was without prejudice to the appellant's rights under the agreements arising from the termination of the agreements. A careful examination of his letter reveals that he made the following representations/proposals to the appellant. First, that the respondent will not be issuing any legal proceedings against the appellant arising from the termination of the agreements. Secondly, that the respondent be paid the sum of RM3.5 million by way of goodwill money. Thirdly, that the

A appellant include the respondent's assets in the original concession area as its contribution to the capital of the joint-venture company to be formed together with the appellant.

[19] The appellant's reply contained in its letter of 28 November B 1976 on the aforesaid three matters, in our judgment, totally refutes the respondent's claim that it did not file its claim earlier based on the representations and conduct of the appellant. First, the fact that Yang Berhormat Tengku Razaleigh Hamzah's letter was written without prejudice to the appellant's rights following the C termination, clearly amounts to an acknowledgement on the part of the respondent that the ongoing negotiations were without prejudice to the appellant's rights as the victim of the respondent's breach of cl. 5(b) of the principal agreement. We are fortified in this conclusion by the contents of the last paragraph of the D appellant's letter to this effect:

> Suka juga dipertegaskan di sini bahawa persetujuan yang dibuat ini tidak memperasangkakan akan tindakan yang telah diambil oleh Kerajaan Negeri dan seterusnya juga bagi sebarang perkiraan yang akan dilakukan kemudian kelak terhadap usaha-usaha yang E dirancangkan bagi pembangunan di kawasan ini (Paragraph 4 of letter at p. 314 of Jilid 3 Bahagian C).

Secondly, the reference in the appellant's letter to the respondent not instituting any proceedings was nothing more than a repetition F of what was represented by Yang Berhormat Tengku Razaleigh Hamzah in his letter of 28 September 1976. There is no suggestion in the appellant's letter that this representation was made at the request of the respondent or in exchange for a promise by the appellant to set up the joint-venture company. G Thirdly, the appellant never acceded to the request that the respondent's assets in the 'reduced specified area' be treated as the respondent's contribution to the joint-venture company. The appellant's refusal to accede to this request is consistent with no agreement having been reached on the formation of the joint-H venture company. Finally, the request for the payment of RM3.5 million by Yang Berhormat Tengku Razaleigh Hamzah 'as a gesture of goodwill' is consistent with the respondent not being entitled to any form of damages or compensation in respect of a breach of cl. 5(b) of the principal agreement.

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[20] Viewed against the aforesaid background facts, in our judgment, there was never an unconditional commitment on the part of the appellant to set up a joint-venture company along the lines pleaded by the respondent, certainly not in the minutes of the meeting of 17 June 1975 or at all. In any event, for such an agreement to be enforceable, in law, it is essential that the parties reach agreement on the terms upon which the joint-venture is to be formed and was to operate as a company. The respondent quite clearly recognised the need for such details to be agreed upon and hence the letter of 16 October 1975 outlining the details of the makeup of the joint-venture company in terms of directorships, capital etc. However, the fact of the matter is that the appellant never reverted to the respondent on its proposals and less still agreed to the proposals contained in the respondent's letter of 16 October 1975 so as to bring about a binding legal contract (see the case of *JH Milner & Sons v. Percy Bilton Ltd* [1966] 2 All ER 894 at p. 898 for the distinction between an 'understanding' and a 'binding legal contract').

Fourth Issue

[21] On the fourth issue of limitation, it is an undisputed fact that to the extent that the respondent's complaint is that the termination was unlawful, time commenced to run for the purposes of the Limitation Act 1953 from 18 March 1975. Accordingly in the ordinary course of events, the respondent should have filed its claim on or before 17 March 1981 to preclude the same from being defeated by the defence of limitation. Since the respondent filed this claim on 8 October 2004, the claim is well and truly barred by limitation unless the commencement was postponed as claimed by the respondent.

[22] Now the respondent sought to refute the defence of limitation on three grounds. The first ground was that the defence of limitation was pleaded to defeat the respondent's claim based on the agreements but not the claim based on the settlement agreement. Secondly, that the appellant had prior to the trial of this action applied unsuccessfully to strike out the respondent's claim on this very ground of limitation and the application dismissed by the learned Senior Assistant Registrar on 1 November 2007. Since there was no appeal from this decision, it

was submitted that it was no longer open to the appellant to rely on the defence of limitation. Thirdly, the respondent alleged that the appellant is estopped from raising the defence of limitation by reason of having actively exchanged correspondence with the respondent on matters relating to the amicable settlement of the respondent's claim culminating in the appellant entering into the settlement agreement of 17 June 1975. According to the respondent, the appellant indulged in such correspondence so as to induce the respondent into not filing any claim whilst simultaneously transferring the subject matter of the settlement agreement to third parties. The respondent relying on s. 29 of the Limitation Act submitted that by reason thereof, the time for it to file the claim did not commence until the respondent discovered the fraud perpetrated by the appellant and such fraud was only discovered by the appellant sometime in January 2003.

[23] In our judgment, none of the matters raised in para. 22 herein preclude the appellant from relying on the defence of limitation. As regards the first ground, in our judgment, the plea of limitation in para. 18 of the statement of defence is sufficiently comprehensive to allow the appellant to rely on this defence irrespective of whether the claim is based on the agreement or the settlement agreements. Paragraph 18 reads as follows:

> Defendan sekali lagi mengatakan bahawa tindakan Plaintif ini adalah dihalang oleh had masa dan Defendan berhak ke atas pembelaan tersebut di sisi undang-undang.

As regards the consequences of the appellant not having appealed from the decision of the learned Registrar, with respect, we do not consider this to be a relevant consideration as the application before the learned Registrar was one based on O. 18 r. 19 of the Rules of the High Court 1980. In our opinion, the fact that the application was refused does not necessarily imply that the application was refused because the appellant failed to prove the defence of limitation. It is conceivable that the application was refused because the learned Registrar was of the opinion that there had to be a trial of the action before the court could determine whether the respondent's claim was defeated by limitation. Accordingly, for the defence of *res judicata* to avail the respondent, it is imperative that the court examines the judgment of the learned Senior Assistant Registrar. In this case, the learned

Senior Assistant Registrar did not provide any grounds of judgment and the respondent is not contending before us that the learned Senior Assistant Registrar had expressly ruled that the defence of limitation was not available to the appellant at the trial of the action. In these circumstances, in our judgment, the appellant is not precluded by the doctrine of *res judicata* from raising the defence of limitation. Finally, on the issue of the applicability of s. 29 of the Limitation Act, we are satisfied on an examination of the correspondence exchanged between the parties following the termination notice that the appellant did not at any time either by way of representation or conduct unequivocally cause the respondent to believe that the appellant would not rely on the defence of limitation so long as settlement negotiations were ongoing. On the contrary, we are satisfied that it was the respondent who was pursuing negotiations with little or no positive interest on the part of the appellant in the direction of settlement and the offer to not pursue legal proceedings against the appellant originated from the respondent of its own volition. It is also our considered view that the allegation of the respondent that the commencement of time to compute the defence of limitation should be postponed because of a fraud perpetrated by the appellant is nothing but a red herring. The fact of the matter is that the respondent was well aware even before 1989 that the appellant did not acknowledge any agreement as to the existence of the joint-venture company. This is evident from the contents of the respondent's own letter of 14 November 1989 wherein the respondent was pleading to be allocated 20,000 acres in mitigation for the losses purportedly suffered by it arising from the appellant's refusal to participate in the joint-venture. Furthermore, the fact that the respondent *vide* its then solicitor's letter of 24 January 1995 proposed reverting to negotiations on the joint-venture if the appellant was not prepared to fulfil its earlier promise to grant the respondent 20,000 acres impliedly amounts to the respondent acknowledging that between 1977 and 1995, the appellant had rejected participation in any form of joint-venture with the respondent. Finally, having regard to the express reservation by the appellant to deal with the 'reduced specified area' in such manner as it deemed fit following the termination of the agreement, it is preposterous for the respondent to now allege that the appellant had perpetrated a fraud on the respondent by allocating the 'reduced specified area' to third parties (see the appellant's letter of 26 November 1976 at p. 314 Jilid 3 Bahagian C).

A **Fifth Issue**

[24] By reason of our findings that the termination was not unlawful and no settlement agreement had come into force, it is strictly unnecessary for us to deal with the issue of damages. However, we propose to touch briefly on the issue of damages to remind lawyers acting for claimants of the nature of the evidence that would typically have to be produced in a court of law before the court can award substantial damages in a claim based on a breach of contract. Take this case. The respondent's claim was that arising from the failure of the appellant to honour the terms of the settlement agreement, it was denied the right to log the 'reduced specified area' for the original agreed contractual period of 33 years. The respondent purported to satisfy the requirements of the law governing proof of the quantum of damages by calling an expert witness (SP3) to provide evidence on the value of the 'reduced specified area' on a per acre basis. Based on the evidence of SP3 of the "expected gross profit per year based on 2008 price" and "expected additional profits from downstream processing of logs" (see the witness statement of SP3), the learned trial judge ordered the appellant to pay general damages of RM560 million for the respondent's purported 30% share of the joint-venture company.

[25] With respect, the mode of computation adopted by the learned trial judge did not comply, in our judgment, with the principles of law governing the quality of evidence that has to be produced by the claimant ie, the respondent in this case, to succeed in obtaining substantial damages in a claim based on breach of contract. In our judgment, the principles of law governing the quality of evidence that must be produced is usefully set out in the judgment of Edgar Joseph Jr J (as His Lordship then was) in the case of *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 at p. 644:

> It is axiomatic that a plaintiff seeking substantial damages has the burden or proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.

Thus nominal damages may be awarded in all cases of breach of contract. (See *Marzetti v. Williams* [1830] 1 B & Ad 415). And, where damages is shown but its amount is not proved sufficiently or at all, the Court will usually decree nominal damages. See, for example, *Dixon v. Deveridge* [1825] 2 C & P 109 and *Twyman v. Knowles* [1853] 13 CB 222.

On the question of the quality of evidence expected of a plaintiff it is well to remember what Devlin J said in *Biggin v. Permanite* [1951] 1 KB 422, 438 namely, "where precise evidence is obtainable, the Court naturally expects to have it, where it is not, the Court must do the best it can." Nevertheless, it remains true to say that generally "difficulty of proof does not dispense with the necessity of proof" (see *Aerial Advertising Co. v. Batchelors Peas* [1938] 2 All ER 788, 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v. Curtin* [1971] WLR 1731 (CA) in which the plaintiff claiming for diminution of profits of his one man business failed in his claim even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the Court will expect precise evidence to be given (see para. 345 *McGregor on Damages*, 15th edn.).

[26] If the learned trial judge had applied the principles of law enunciated by the learned judge in *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd (supra)* to the facts of this case, it would have been evident to His Lordship that the best evidence of the value of the 'reduced specified area' would be the profits derived by the respondent during the 11 years ie, from 1964 to 1975 that it operated the 'reduced specified area'. Bearing in mind that the respondent is a limited company and obliged in law to prepare and lodge its accounts with the Registrar of companies and submit tax returns on its income and expenditure, in our judgment, the best evidence of the value of the remaining part of the 'reduced specified area' would be the average yearly profits derived by the respondent during the 11 years that it operated in the 'reduced specified area' multiplied by the remaining acreage for the remaining years of the concession. With respect, the learned trial judge instead of determining the value of the 'reduced specified areas' based on the trees in that

area and conditions prevailing therein, relied on the evidence of SP3. The evidence of SP3 was severely criticised by learned counsel for the appellant on the grounds that:

(i) SP3 agreed that he had no knowledge about the price of timber between 1976 to 1985 due to the fact that he had no record of the same;

(ii) SP3 also relied on the price of timber provided by the Malaysian Timber Industry Board for the years 2003 to 2008, which was only for one size;

(iii) SP3 further agreed that he used the price of timber for the year 2008 and believed that it was the best choice of price. Further, SP3 acknowledged that the price of timber in 2008 which he referred to was actually an indicative price;

(iv) SP3 also agreed that the prices of timber between the 1976 to 2008 were varied accordingly;

(v) SP3 agreed that the price of timber stated in the calculation was not the price for the year 1976 but instead it was the price of timber for the year 2008; and

(vi) SP3 also testified for instance that, in the year 2008, the price of Merbau timber was RM1240/m3 whereas the price in the year 2003 was only RM880/m3.

[27] In our judgment, if the learned trial judge had applied the principles of law enunciated in *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd (supra)*, His Lordship would have awarded by way of general damages the aggregate figure derived after applying the formula set out in para. 26 of this judgment. On the facts of this case, by awarding general damages based on the evidence of SP3, His Lordship effectively awarded general damages based on profits which had no relevance to the quality of the trees in the 'reduced specified area'; without due regard to the prices prevailing during different periods of the contract and without due regard to any conditions which may have been peculiar to the 'reduced specified area' such as the costs of infrastructure etc. For this reason, in our judgment, there is merit in the criticism of the learned trial judge's reliance in the evidence of SP3 to found His Lordship's decision on general damages.

[28] Accordingly, this appeal is allowed with costs. Order of the High Court Judge is hereby set aside. Following our decision to allow this appeal, it must necessarily follow that Civil Appeal No. D-01-96-2010 where the respondent in this appeal is the appellant be dismissed with costs. We order the respondent to pay costs of RM300,000 to the appellant as costs here and below in respect of both the appeal and cross-appeal. Deposit refunded to the appellant.

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